



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

January 5, 2023

To:

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Circuit Court Judge
Electronic Notice

Kara Lynn Janson
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John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
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Jeffrey Ocwieja
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You are hereby notified that the Court has entered the following opinion and order:

2019AP2133-CR

State of Wisconsin v. Eric Howard (L. C. No. 2017CF241)

Before Stark, P.J., Hruz and Gill, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Eric Howard appeals from a judgment convicting him of six felonies and three misdemeanors, all arising out of an incident in which he held several family members hostage. He challenges two circuit court orders regarding his competency to stand trial. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We affirm.

After Howard's trial counsel raised the issue of competency at the initial appearance, the circuit court ordered a competency evaluation and scheduled a hearing. At the competency

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

hearing, the State presented a report and expert testimony from licensed psychologist Nancy Elliott. Elliott noted that Howard had “a very long history of emotional and behavioral dysregulation”—some of which could be related to fetal alcohol syndrome or an anoxic brain injury at birth; she observed that Howard was exhibiting psychotic symptoms; and she discussed Howard’s inability to assist with his own defense, although he had “previously gone through the legal system as a competent adult.” Elliott concluded that Howard was incompetent to stand trial, but that he was likely to regain competency with treatment in an institutionalized setting within a year if his psychotic symptoms could be controlled by medication and his emotional disorders were addressed. Elliott based her opinion on a clinical interview she conducted with Howard, her review of Howard’s extensive medical and mental health records, her review of the criminal complaint and Howard’s criminal history, and consultation with Howard’s counsel. The circuit court relied upon Elliott’s opinion to find Howard was incompetent to stand trial but likely to regain competency with treatment. However, the court determined that an insufficient foundation had been provided to issue an involuntary medication order.

Licensed psychologist Stefany Trevino met with Howard several times to perform a three-month competency review. In her report to the circuit court, Trevino noted that Howard had not been prescribed any psychotropic medications since his prior competency evaluation. Nonetheless, Trevino observed that Howard was “fully oriented”; his “fund of knowledge, concentration, and memory were intact”; his thought process was “organized”; “there was no evidence of overt bizarre delusional thought content”; and there was no evidence that Howard was responding to internal stimuli. Howard also was able to accurately describe all nine charges and the penalties he was facing, as well as information related to how court proceedings work.

Trevino concluded that Howard did not lack the substantial mental capacity to assist in his own defense and was competent to stand trial.

The circuit court subsequently held a competency review hearing. At that hearing, Howard maintained that he was competent to stand trial. Neither the State nor either of Howard's attorneys challenged Trevino's opinion that Howard was competent to stand trial, and they all agreed that Trevino's report could be introduced in lieu of additional testimony. The court proceeded to adopt the conclusions in Trevino's report without taking further evidence, and it found Howard competent to proceed.

On this appeal, Howard first contends that the circuit court's finding that he was likely to regain competency with treatment was clearly erroneous. In particular, Howard points to evidence that: (1) he had at least thirty hospitalizations for mental health crises and had no identifiable periods of long-term psychological or behavioral stability in his entire life; (2) there was no indication that the issue of Howard's competency had been raised in his prior court proceedings; and (3) mental deficiencies from fetal alcohol syndrome typically are not treatable.

A circuit court's competency determination is not clearly erroneous unless it is "totally unsupported by facts in the record." *State v. Smith*, 2016 WI 23, ¶29, 367 Wis. 2d 483, 878 N.W.2d 135. Contrary to Howard's arguments on appeal, this standard is not met merely because other evidence or inferences would have supported a different decision. Here, Elliott explained that Howard suffered from multiple mental health issues; that his symptoms from some of those issues were not being controlled; and that if Howard's symptoms were controlled, he could regain the same level of competency that had allowed prior criminal cases against him

to proceed. Elliott's report and testimony thus provided an adequate evidentiary basis to support the circuit court's determination.

Howard next contends that the circuit court's finding that he had regained competency was clearly erroneous. That argument is procedurally barred, however, by both the doctrines of judicial estoppel and forfeiture.

The doctrine of judicial estoppel precludes a party from selling a court on one position and then repudiating that position to gain a second victory. *State v. Johnson*, 2001 WI App 105, ¶10, 244 Wis. 2d 164, 628 N.W.2d 431. The doctrine applies when: (1) a litigant's position is "clearly inconsistent" with a prior position; (2) the facts at issue are the same; and (3) the party to be estopped convinced the court to adopt the prior position. *Id.* Notably, "[i]nstances in which a defendant in a criminal case reverses positions on appeal most often fit [the above] parameters since the facts are the same and it is easier to discern whether the positions are clearly inconsistent." *Id.* Here, Howard's current assertion that he was not competent to stand trial is clearly inconsistent with his assertion at the competency review hearing that he was competent. The facts set forth in Trevino's report and Howard's underlying records have not changed. The circuit court expressly took Howard's position into account when adopting Trevino's report.

Under the forfeiture doctrine, "issues not raised or considered in the [circuit] court will not be considered for the first time on appeal." *State v. Bodoh*, 226 Wis. 2d 718, 737, 595 N.W.2d 330 (1999) (citation omitted). This rule provides the court with a fair opportunity to address and potentially correct an alleged error without the need for appeal and prevents the parties from "sandbagging" by failing to object to an alleged error for strategic reasons and then later claiming that the error is grounds for reversal. *State v. Huebner*, 2000 WI 59, ¶12, 235

Wis. 2d 486, 611 N.W.2d 727 (citation omitted). Because Howard did not object to being found competent, the court did not take additional evidence, make credibility determinations, or discuss its own observations of Howard. This is precisely the type of situation in which forfeiture should apply.

Therefore,

IT IS ORDERED that the judgment of conviction is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals